(1) No. 95-803

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1995

WILLIAM C. BLACK, JR., Ph.D.,

Petitioner,

v.

UNITED STATES OF AMERICA, et. al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DANIEL S. ALCORN*
***Counsel of Record**
Fensterwald & Alcorn
1952 Gallows Road,
Suite 307
Vienna, VA 22182
(703) 734-0500

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

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QUESTIONS PRESENTED

The Director of Central Intelligence has asserted "state secrets" privilege to block Dr. William Black, Jr. from pursuing his Constitutional Fourth Amendment and other claims against tortious conduct of the intelligence agencies. The lower courts in this case have acquiesced in the assertion of the "state secrets" privilege even though it bars a citizen from pursuing a cause of action arising from the Bill of Rights and related actions against the very conduct by the government which is restrained by the Bill of Rights. The lower courts have denied Dr. Black a forum to pursue redress of his Fourth Amendment Bivens and other claims. The questions presented are:

1. Whether the Judicial branch will sanction the use by a federal executive agency of the "state secrets" privilege to bar claims alleging unconstitutional tortious acts violating the Bill of Rights, and thereby deny the citizen a remedy to which he is otherwise entitled.

2. Whether the "state secrets" privilege can bar from the Courts a case in which a cause of action under the Bill of Rights is stated together with a related cause of action, given that this Court has ruled that the Bill of Rights is a limitation on the general powers of the government.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Eighth Circuit were William C. Black, Jr., Ph.D. (Plaintiff- appellant), and the United States of America; Central Intelligence Agency; Federal Bureau of Investigation; "Olin Peter Nielson"; John Does one through ten; unknown officials of the Central Intelligence Agency, Federal Bureau of Investigation, the Department of Defense and Department of State (Defendants- appellees).

The Petitioner before this Court is William C. Black, Jr., Ph.D., and respondents are the Defendant-appellees listed above.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3

STATEMENT OF THE CASE 3

A. Proceedings Below 3

B. Statement of facts 5

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS OF THE LOWER COURTS PERMIT THE EXECUTIVE BRANCH TO DEFEAT A CITIZEN'S FOURTH AMENDMENT RIGHTS WITH A UNILATERAL, SECRET AND UNCHALLENGEABLE CLAIM OF STATE POWER. SUCH A CLAIM VIOLATES THIS COURT'S HOLDING IN THE "PENTAGON PAPERS" CASE THAT THE BILL OF RIGHTS IS A LIMITATION ON THE GENERAL POWERS OF THE GOVERNMENT..... 14

II. THERE IS NO AUTHORITY FOR THE PROPOSITION THAT THE BILL OF RIGHTS IS OVERRIDDEN BY THE STATE SECRETS PRIVILEGE, AS OCCURRED IN THIS CASE. 22

CONCLUSION 27

TABLE OF AUTHORITIES

Cases Page

Bivens v. Six Unknown Agents, 403 U.S. 388 (1971) 19,20,23

Duncan v. Cammell, Laird & Co. (1942) A.C. 624 (House of Lords, United Kingdom) 24

New York Times Company v. United States, 403 U.S. 713 (1971)... 17,18

Totten v. United States, 92 U.S. 105 (1875) 20,21

United States v. Burr, 25 F.Cas. 30 (C.C.D. Va. 1807) (No. 14,692d)..21,22,23

United States v. Reynolds, 345 U.S. 1 (1953) 15,16,19,20,22,23

Constitution

U. S. Constitution, Fourth Amendment 3,17,19

Statutes

28 U.S.C. Section 1254(1) 2

28 U.S.C. 1331 4

28 U.S.C. 1332 4

28 U.S.C. Section 1343(a)(3) 4

28 U.S.C. Section 1346(b)..... 4

28 U.S.C. Section 1346(g) 4

28 U.S.C. Section 2401(b) 4

28 U.S.C. Section 2671 et seq. .. 4

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Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Dr. William C. Black, Jr. hereby respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals affirming the District Court is not yet reported but is reprinted at Appendix ("App.") 1a. The final opinion of the district court is reprinted at App. 25a, and the earlier opinion of the district court is reprinted at App. 55a.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Eighth Circuit was entered on August 15, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. CONSTITUTION, Amendment IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

a. Proceedings below

This controversy arises out of an action brought by Dr. Black against United States government agencies for violation of his right to be secure in his person and possessions under the Fourth Amendment to the Constitution, and under the Federal Tort Claims Act, 28

U.S.C. Sections 1346(g), 2401(b) and 2671 et seq., for intentional infliction of emotional distress upon him by those agencies. Jurisdiction in the district court was pursuant to 28 U.S.C. Sections 1331, 1332, 1343 (a)(3), and 1346(b)

At the district court, the then Director of Central Intelligence for the United States government interposed a claim of "state secrets" privilege as to the facts giving rise to Dr. Black's claims stated in his amended complaint. (Text of the amended complaint is reprinted at App. 96a.) The district court ruled that the claim of state secrets privilege was properly made and the facts it covered were at the core of the case, and therefore the case could go no further, and the case was dismissed.

Dr. Black appealed to the Court of Appeals for the Eighth Circuit, which affirmed the trial court after conducting an ex parte in camera review of the state secrets claim. The Court of Appeals recited that the information covered by the privilege is at the core of Black's claims, and that the litigation cannot be tailored to accommodate the loss of the privileged information.

b. Statement of Facts

Petitioner Dr. William C. Black, Jr. is an electrical engineer and has worked in the area of integrated circuit design since 1978. He received a Ph.D. in electrical engineering from the University of California at Berkeley in 1980. In the late 1970's he began performing student intern work and

contract work for government related projects for several companies, including Sandia Laboratories, Hughes Aircraft and Honeywell's Defense Systems Division. In connection with his work, Dr. Black received a Department of Energy 'Q' clearance and a Department of Defense 'Secret' security clearance although he did not perform classified work. His 'Q' clearance expired in 1981, and his DoD clearance expired in August 1987 both due to inactivity.

In November 1986 while his security clearance was still current Dr. Black began teaching technical short courses at the Swiss Federal Institute of Technology in Zurich. While there he had professional contact with a Soviet mathematician who Dr. Black felt asked

him intrusive and suspicious questions.

Dr. Black reported these questions to the U. S. Consulate as required by his security clearance and later met with Lynn Levenson, an economic officer stationed at the U. S. Embassy in Bern, regarding his contact with the Soviet mathematician. Dr. Black met with Levenson several times on his next visit to Switzerland in April 1987 at her request.

In January 1987 after Dr. Black returned to the United States he was contacted by Olin Peter Nielson who identified himself as a CIA employee. The United States has acknowledged that the name, Olin Peter Nielson, is an alias. "Nielson" questioned Dr. Black about his contact with the Soviet

mathematician, and instructed him to report any foreign travel plans to "Nielson". "Nielson" did not specifically ask Dr. Black to be an informant, but Petitioner cooperated with "Nielson" because he thought he was obligated to do so as he was still covered by a security clearance.

"Nielson" continued to contact Dr. Black about the Institute in Zurich and the Soviet mathematician, even to the extent of contacting Dr. Black at his father's house in Iowa when Dr. Black had not told "Nielson" of his plans to be in Iowa. After his security clearance expired in August 1987 Dr. Black decided he did not need to report any information to "Nielson" or Levenson, and although he returned to Europe to teach short

courses and informed "Nielson" in advance of this trip, he did not report back about this trip until after he began to be harassed.

In October 1987 Dr. Black became the subject of a concerted effort of harassment and psychological attack. Dr. Black's apartment was repeatedly entered without his permission in his absence and items moved or rearranged. His automobile was similarly entered and disturbed.

Further Dr. Black observed that very noticeable patterns of filament stitching were sewn into his living room carpet and changed appearance, sometimes day to day. During this period Dr. Black heard repetitive loud sounds of rolling dice from a nearby apartment when

he entered or left his apartment. He received strange telephone calls and false fire alarms, and on several occasions was overtly followed.

In early January 1988 persons thought to be government agents visited Dr. Black's father, causing Dr. Black to write "Nielson" to inquire about the purpose of this visit. "Nielson" telephoned Dr. Black to deny CIA involvement and said "it must have been the other side" that visited his father. Following this incident, Dr. Black sought medical treatment for extreme stress and anxiety for the first time in his life.

Later in January 1988 "Nielson" called Dr. Black and requested that he meet with "a few other people". On

February 4, 1988 Dr. Black met with "Nielson" and three other persons, two of whom were described as being from Washington, D. C., and the third a field man. At the end of this meeting "Nielson" talked about the CIA's role of "enforcement", and how this enforcement role interfered with collection of information. Dr. Black took these comments as threatening.

In late February 1988 after Dr. Black inquired as to the nature of any monitoring of his affairs, "Nielson" informed Dr. Black that there would be no more direct contact with him. Following this conversation the harassment of Dr. Black resumed after a short hiatus. His automobile was entered and disturbed. The loud amplified noises

began again from the neighboring apartment. Dr. Black received numerous hang-up and tape-recorded telephone calls, including calls that displayed knowledge of his contemporaneous actions in his apartment.

In March 1988 Dr. Black's apartment was entered again and disturbed, and he discovered that a foreign substance had been deposited on his bed and sofa which caused him to suffer numbness and hallucinations after touching the substance.

As a result of this harassment Dr. Black became extremely anxious and physically ill, resulting in his hospitalization in April 1988. On May 3, 1988, the day before his release from the hospital, a mysterious deposit was made

into one of Dr. Black's brokerage accounts in an amount approximately equal to the bill for his hospitalization.

Subsequent to his hospitalization the harassment continued into 1990, including harassing telephone calls and an entry into his apartment. Harassing telephone calls continued into 1992.

In early 1989 Dr. Black filed Freedom of Information Act requests with the CIA, FBI and Department of State, and received some information from his files. He also contacted United States Senator David Durenberger to make inquiries into this matter, and Dr. Black's office was broken into shortly thereafter.

Due to the content of the harassing telephone calls and the circumstances of other of the acts of invading his home

and car, Dr. Black believes the harassment and break-ins are the acts of United States government agents, and are related to Dr. Black's contacts with the CIA and other U. S. agencies. Dr. Black commenced his action in United States District Court in Minnesota in September 1992.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS OF THE LOWER COURTS PERMIT THE EXECUTIVE BRANCH TO DEFEAT A CITIZEN'S FOURTH AMENDMENT RIGHTS WITH A UNILATERAL, SECRET AND UNCHALLENGEABLE CLAIM OF STATE POWER. SUCH A CLAIM VIOLATES THIS COURT'S HOLDING IN THE "PENTAGON PAPERS" CASE THAT THE BILL OF RIGHTS IS A LIMITATION ON THE GENERAL POWERS OF THE GOVERNMENT.

The Supreme Court has spoken on the

scope and extent of the "state secrets" privilege only once, in the Korean War era case United States v. Reynolds, 345 U.S. 1 (1953). The Court has never spoken on a conflict between assertion of state secrets and the rights of the citizen under the Bill of Rights. This Court in the Reynolds case took notice of the war conditions at the time of that matter, stating, "In the instant case we cannot escape judicial notice that this is a time of vigorous preparation for national defense." Id. at 10. The limited use of the privilege permitted in that case was stated to be required in light of transitory defense considerations.

The result in Reynolds was that the plaintiff's actions for wrongful death

brought under the Federal Tort Claims Act were remanded and allowed to proceed in the trial court, as this Court found that the sensitive information at issue was not relevant to the issues of causation of the accident. Unlike the case at hand the Plaintiffs in Reynolds were given their day in court on their claim.

This Court stated, "(t)herefore, it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets." Id. at 11.

In the instant case, the state secrets concept has expanded dramatically to bar from consideration by the courts a Constitutionally based cause of action arising from violation of a citizen's

fundamental right under the Fourth Amendment to be secure in his person, house, papers and effects.

The instant case then poses a question which goes to the heart of the Constitution- may the government unilaterally bar a claim based upon the government's unconstitutional acts in violation of the citizen's rights under the Bill of Rights?

The U. S. government and the lower courts in this case believe that "state secrets" is a concept so unassailable that it will outweigh the protections of the Bill of Rights. This Court has certainly never expressed such an opinion, and in fact has expressed the contrary opinion in the "Pentagon Papers" case in which the United States

attempted to restrain the New York Times and the Washington Post newspapers from printing a classified report on the Vietnam war.

In that case this Court considered the history of the Bill of Rights and held that the first ten amendments to the Constitution, adopted after the main body of the Constitution, were intended to be limitations on the general powers of government. "The amendments were offered to curtail and restrict the general powers granted to the Executive, Legislative, and Judicial Branches two years before in the original Constitution." New York Times Company v. United States, 403 U.S. 713, 716 (1971). The holding in that case was that the general powers of the federal

government could not defeat the provisions of the Bill of Rights.

Similarly, in criminal cases the United States may not invoke state secrets and maintain a prosecution against an individual, as the government has "the duty to see that justice is done." Reynolds at 12. This Court distinguished Reynolds as a civil case in which the United States "is a defendant only on the terms to which it has consented" under the Federal Tort Claims Act. Id.

The cause of action in this case does not rely on consent by the United States to be sued, rather this Court created a cause of action based on violations of the Fourth Amendment in the case of Bivens v. Six Unknown Agents, 403

U.S. 388 (1971). In that case this Court quoted the seminal case of Marbury v. Madison, "(t)he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Bivens, 403 U.S. at 397. This Court found the cause of action to arise from the language of the Fourth Amendment itself, and the Petitioner in this case pled such a cause of action. Id.

Nor is the state secrets privilege one which is well based in U. S. law other than the Reynolds case. The Court of Appeals cites the case of Totten v. United States, 92 U.S. 105 (1875), yet that case does not relate to a state secrets evidentiary privilege and is not

authority for such a concept. Rather the reasoning of Totten is that a contract for services by a secret agent is one that requires secrecy on behalf of the agent, and therefore the agent has violated the contract by bringing action for payment in the courts. There were no constitutional issues in Totten, and certainly no consideration of the Bill of Rights and its limitation on the general power of government.

The other case cited by the Court of Appeals is United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d). Yet the result in this part of the Burr case does not establish a state secrets privilege, rather the issue is deemed avoided by the court on the facts. Chief Justice Marshall in the opinion does

raise the troubling prospect of how to maintain a criminal prosecution if evidence is claimed to be secret, a question answered in the Reynolds opinion in which the Court stated that no criminal prosecution could be maintained where the government claimed secrecy for relevant evidence. The Burr decision cited does stand for the proposition that in the United States as opposed to England the chief executive is not above the law and is bound by the provisions of the Constitution and thus subject to subpoena by a Court. Id. at 34.

II. THERE IS NO AUTHORITY FOR THE PROPOSITION THAT THE BILL OF RIGHTS IS OVERRIDDEN BY THE STATE SECRETS PRIVILEGE, AS OCCURRED IN THIS CASE.

The Court of Appeals did not weigh

the constitutional issues raised in this case where the privilege was used to defeat a Bivens claim, and in fact the Burr opinion cited supports the long established view that Constitutional provisions are paramount and must be upheld.

Nor does the Reynolds case in any way provide authority for the proposition that the privilege can bar a claim under the Bill of Rights. The Reynolds decision involves a civil dispute in which a wrongful death claim has been filed, rather than a Constitutional cause of action.

The Court in Reynolds acknowledged that "judicial experience with the privilege which protects military and state secrets has been limited in this

country". Id. at 6. The Court noted that there had been more experience in England, though still relatively slight, but cited the British House of Lords decision Duncan v. Cammell, Laird & Co. (1942) A.C. 624. This case also involved a commercial dispute touching on military operations during the Battle of Britain phase of World War II. Obviously, a British case would not consider the impact of the Bill of Rights of the United States Constitution upon an assertion of a governmental privilege.

This Court has never discussed or analyzed the effect of an assertion of "state secrets" privilege on a claim based on the Bill of Rights, other than to protect the individual in a criminal case context. It is axiomatic that for

the Bill of Rights to have any meaning it cannot be subverted by a claim of governmental privilege, as has occurred here. Further in the context of numerous contemporary disclosures of dishonest actions within the intelligence agencies of the United States, it is little protection for the individual that an ex parte in camera presentation to the lower courts be given uncritical acceptance by the judiciary.

Recent disclosures of misconduct in the intelligence agencies, and particularly the covert operations directorates of the intelligence agencies require that the courts not default in their constitutional role to protect the individual from abusive state power.

The intelligence agencies are part

of the United States government, and their behavior is limited by the protections of the Bill of Rights. It is constitutionally impermissible to exempt the behavior of these institutions from constitutional control and accountability, for the whole of human history teaches that unaccountable power results in corrupted power. This nation was founded in opposition to this trend of human history, and this Court is bound by oath to protect the citizens of this country from such actions. The nation has been through a difficult time of war and cold war, and many habits have developed in contravention of the intention of the Constitution, and this Court needs to speak clearly to the growing concern in the nation that the

Constitution has lost its force as a limitation on unbridled state power. One might argue that the future of our nation depends on this Court revitalizing the spirit of the nation through clear decision that the power of the state is limited by the Bill of Rights, and that the citizen is supreme where the Constitution so provides.

CONCLUSION

In sum for the foregoing reasons this case presents an important unresolved constitutional issue of great contemporary importance. A writ of certiorari should issue to review the judgement of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

DANIEL S. ALCORN
Counsel of Record
FENSTERWALD & ALCORN
1952 Gallows Road
Suite 307
Vienna, VA 22182
(703)734-0500

November 7, 1995